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No. 76-709

In the Supreme Court of the United States

OCTOBER TERM, 1976

EARL L. BUTZ, ET AL., PETITIONERS

v.

ARTHUR N. ECONOMOU, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a–22a) is reported at 535 F. 2d 688. The opinion of the district court (Pet. App. B, pp. 23a–28a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C, pp. 29a–30a) was entered on April 23, 1976. A petition for rehearing with a suggestion for rehearing *en banc* was denied on July 23, 1976 (Pet. App. D, pp. 31a–32a). On October 14, 1976, Mr. Justice Marshall extended the time within which to file a

petition for a writ of certiorari to and including November 19, 1976. The petition for a writ of certiorari was filed on that date and was granted on February 22, 1977 (A. 166). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether federal government officials have an absolute rather than a qualified immunity from suits for damages based upon their performance of official duties in connection with administrative enforcement proceedings.

STATEMENT

This is a suit seeking damages of $32 million from officials of the Department of Agriculture based upon their actions in initiating and conducting, allegedly wrongfully and maliciously, an administrative enforcement proceeding based upon respondent's violations of the Commodity Exchange Act. The district court dismissed the suit, holding that the officials had absolute immunity from suit for acts done as part of their official duties. The court of appeals reversed, ruling that the officials' immunity was only qualified, not absolute.

1. Respondent Arthur N. Economou and Co., Inc., which is controlled by respondent Economou (respondents are hereinafter referred to as "respondent"), was registered with the Department of Agriculture as a futures commission merchant (A. 144). As such it was required periodically to file reports,

including a financial statement showing that it maintained the minimum capital balance prescribed by the Secretary of Agriculture under the Act. 17 C.F.R. 1.17 (1970); see *id.* at 1.10 (1970).

Respondent's March 31, 1969, report raised a question concerning the validity of some of its claimed current assets (A. 144). For that reason, the Director of the Registration and Audit Division of the Commodity Exchange Authority directed the regional office in New York to institute an audit to determine the accuracy of the financial statement (A. 144).[1] Such audits are made routinely (A. 144).[2] The audit in this case was conducted primarily by petitioner Fitzpatrick (A. 144), an auditor in the Commodity Exchange Authority (A. 148).

In February 1970, following the audit and the receipt of other financial statements from respondent (A. 144), petitioner Lyng, Assistant Secretary of Agriculture, issued an administrative complaint under the Act (A. 145; see 7 U.S.C. 9). It alleged that respondent, while a registered futures commission

[1] The Director of the Registration and Audit Division was not named as a defendant in this case and thus is not a petitioner here. Petitioner Caldwell, the Administrator of the Commodity Exchange Authority, initiated the investigation of the financial condition of respondent (A. 145).

[2] Such audits are not conducted of firms that are subject to the financial requirements of the Chicago Board of Trade and the Chicago Mercantile Exchange, since the Secretary has determined that the financial requirements of those exchanges are adequate for the purposes of the Act (A. 144; see 7 U.S.C. 6f(2); 17 C.F.R. 1.17(b) (1970)).

merchant, willfully failed to maintain the minimum financial requirements prescribed by the Secretary. The complaint directed respondent to show cause why its registration should not be revoked or suspended and why it should not be prohibited for a period of time from trading on the commodity markets (CEA Docket No. 167).

Petitioner Caldwell, the Administrator of the Commodity Exchange Authority, was responsible for making copies of the administrative complaint available in the Department of Agriculture Press Room (see A. 145–146). Attached to the copies was a one-page cover sheet that provided in pertinent part (A. 150):

> The complaint charges that during the period from March 31 through June 30, 1969, while a registered futures commission merchant under the Act, the respondent corporation failed to meet minimum financial requirements prescribed for futures commission merchants.
>
> The issuance of a complaint under the Commodity Exchange Act does not constitute proof of violation of the law. Such violation is established only when the Judicial Officer of the Department has made a determination that the evidence substantiates allegations in the complaint. * * *

Following another audit, which was conducted by petitioner Gross, an auditor in the regional office (A. 144), petitioner Lyng in June 1970 issued an amended complaint alleging additional failures to meet the minimum capital requirements (A. 144, 145). Copies

of this amended complaint also were made available in the Press Room, but it cannot be determined whether a cover sheet was prepared and distributed along with the amended complaint (App., *infra*, 61–62).

A hearing on the amended complaint was held in New York on August 5, 6, 7, and 10, 1970, before petitioner Bain, the Chief Hearing Examiner of the Department (A. 144). Petitioner Davis, an attorney in the Department's Office of General Counsel (A. 147), appeared as counsel for the complainant (A. 144), and petitioners Fitzpatrick, McMinn,[3] Kirchoff,[4] and Gross presented evidence for the complainant (A. 144–145).[5] In August 1971, the Chief Hearing Examiner filed his recommendation sustaining the administrative complaint (A. 145).

Respondent filed exceptions to the Hearing Examiner's recommended decision, and requested oral argument before the Judicial Officer of the Department, petitioner Campbell, to whom the Secretary had delegated his authority to decide enforcement proceedings under the Commodity Exchange Act (A. 145; see p. 48, *infra*). On January 15, 1973, the Judicial Officer affirmed the Hearing Examiner's decision, and suspended respondent's registration and

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[3] Petitioner McMinn was the Director of the Eastern Region of the Commodity Exchange Authority (A. 147–148).

[4] Petitioner Kirchhoff was the Deputy Director of the Registration and Audit Division of the Commodity Exchange Authority (A. 146–147).

[5] Petitioner Robinson (the Director of the Compliance Division of the Commodity Exchange Authority (A. 146)) and petitioner Wolkis (see A. 148–149) also collaborated with petitioner Davis in preparing the presentation of the government's case (A. 147).

trading privileges for 90 days (see Decision and Order in CEA Docket No. 167, pp. 11–136, 199).[6]

Respondent filed a petition for review in the United States Court of Appeals for the Second Circuit. In a short, *per curiam* opinion the court of appeals vacated the order of the Judicial Officer on the ground that "the essential finding of willfulness * * * was made in a proceeding instituted without the customary warning letter," which rendered the finding of willfulness "erroneous on the record taken as a whole, and the sanctions imposed unwarranted." *Economou* v. *Department of Agriculture*, 494 F. 2d 519 (C.A. 2); Br. in Opp. 2a–4a.

2. During the pendency of respondent's administrative appeal to the Judicial Officer from the Hearing Examiner's decision, respondent filed the present suit seeking $32 million in damages. The defendants were

[6] A copy of the Judicial Officer's decision and order (which is reported at 32 Agri. Dec. 14) is being lodged with the Clerk of this Court. The Judicial Officer sustained the Hearing Examiner's finding and the allegation in the administrative complaint that respondent's violations of the Act had been willful and thus that no prior notice or opportunity to correct the deficiencies had been necessary before the institution of the enforcement proceedings (Decision and Order, pp. 137–149). See pp. 53–55 *infra*.

The Judicial Officer also found that, although respondent had been registered as a futures commission merchant at the time of the violations, its registration had expired on December 3, 1970 (Decision and Order, p. 11), after the filing of the amended administrative complaint and while the matter was pending before the Hearing Examiner. The Judicial Officer nevertheless determined to order the 90-day suspension of the registration, in order to deter respondent and others from violating the Act (pp. 169–187) and to prevent respondent during that time from again registering (pp. 194-197; see p. 183 n. 116).

the Department of Agriculture and the Commodity Exchange Authority, and all of the petitioners here, except the Judicial Officer, who was added as a defendant in a second amended complaint after he had rendered his decision in the administrative proceeding (A. 156–162).

The second amended complaint alleges principally that the defendants sought to disparage respondent's reputation and ruin his business by wrongfully and maliciously instituting the administrative proceedings against him (A. 159, 161).[7] The complaint alleges that the proceedings were unauthorized because instituted before respondent had been given notice and an opportunity to correct the alleged deficiencies, and that the proceedings should not have been instituted or prosecuted to conclusion since respondent had ceased operating as a futures commission merchant (A. 159). The complaint also alleges that the defendants furnished copies of the administrative complaint to interested persons without also furnishing respondent's answer, and that the defendants issued a false and deceptive press release in connection with the administrative proceedings (A. 158, 160). The complaint suggests that the defendants were motivated to take these actions in retaliation for respondent's

[7] The complaint includes a claim for trespass (A. 161), but the allegations are conclusional (see Pet. App. B, p. 23a–24a n. 1), and peripheral to the principal thrust of respondent's case. The court of appeals did not mention the trespass claim in its description of the complaint (see Pet. App. A, pp. 3a–4a).

outspoken criticism of the regulatory activities of the Authority (A. 157–158, 160).[8]

After respondent twice sought unsuccessfully to enjoin the Department's administrative proceeding (A. 2) and following the court of appeals' vacation of the Judicial Officer's order (see p. 6, *supra*), the defendants moved to dismiss the complaint on the grounds that the individual defendants were immune from suit and that the action against the Department of Agriculture and the Commodity Exchange Authority was barred by sovereign immunity (A. 163). As a part of the defendants' opposition to one of the earlier motions for an injunction, a detailed affidavit had been filed describing the actions taken by the individual defendants in the administrative proceedings that formed the basis of the judicial complaint (A. 142–149; see A. 141).[9] This affidavit was made a part of the defendants' motion to dismiss (A. 163).[10]

On May 22, 1975, the district court dismissed the suit (Pet. App. B, pp. 23a–28a). The court found that the allegedly tortious conduct of the individual defendants was "both within the scope of their authority and discretionary" (Pet. App. B, p. 28a), and on that basis held that they were absolutely immune from

[8] The complaint states that the action is brought, *inter alia*, under 28 U.S.C. 1331, 2201, 2202, "relevant provisions of the Federal Tort Claims Act," 28 U.S.C. 1291, 5 U.S.C. 703, the First and Fifth Amendments, and "such other Constitutional and Federal laws as may be relevant * * *" (A. 156–157).

[9] The details of this affidavit are discussed *infra*, pp. 48–53.

[10] The motion also incorporated the Decision and Order of the Judicial Officer in the administrative proceeding (A. 163, see note 6, *supra*).

suit. The court further held that sovereign immunity barred the suit against the Department of Agriculture and the Commodity Exchange Authority (Pet. App. B, p. 24a).

The court of appeals affirmed the dismissal as to the Department and the Authority but reversed as to the individual defendants (petitioners here) and remanded for further proceedings (Pet. App. A, pp. 1a–22a). The court left undisturbed the findings of the district court and stated (Pet. App. A, p. 8a) that "[h]ad *Barr* [v. *Matteo*, 360 U.S. 564] represented the last word in this evolving area, we might be inclined, as was the district court, to follow it in this case * * *." But the court of appeals, relying largely upon its reading of *Scheuer* v. *Rhodes*, 416 U.S. 232, and *Wood* v. *Strickland*, 420 U.S. 308, concluded (Pet. App. A, p. 20a) that "the individual defendants do not require and are not entitled to absolute immunity * * *." Instead, the court held (*ibid.*) that petitioners could "avail themselves of the defense of qualified 'good faith, reasonable grounds' immunity of the type approved by the Supreme Court in *Scheuer* and *Wood*."

SUMMARY OF ARGUMENT

I. The rule of *Barr* v. *Matteo*, 360 U.S. 564, that federal government officials have absolute immunity from damage suits based upon the performance of their official duties, rests upon the sound considerations that the threat of such suits "might appreci-

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ably inhibit the fearless, vigorous, and effective administration of policies of government" and that such suits "would consume time and energies which would otherwise be devoted to governmental service" (360 U.S. at 571). "[O]ther sanctions than civil tort suits [are] available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner" (360 U.S. at 576).

The doctrine of absolute immunity for federal executive officials did not originate with *Barr;* it was derived many years before from the immunity traditionally afforded judges, and, by the time *Barr* was decided, "the law * * * was overwhelmingly what the majority held it to be in the Barr case * * *." Davis, *Administrative Law Treatise* § 26.04, pp. 876–877 (1970 Supp.). *Barr* made clear, however, that the existence of absolute immunity depends not upon the rank of the official but upon the nature of the duties performed. Moreover, although *Barr* involved a libel suit, its rationale has not been restricted to such cases. This Court has not given *Barr* such a limited reading, and, relying upon *Barr*, the courts of appeals have applied the doctrine of absolute immunity in a wide variety of circumstances.

In *Doe* v. *McMillan,* 412 U.S. 306, the Court placed a gloss upon the *Barr* principle by ruling that where the government official does not exercise any significant discretion in performing his official duties, he has absolute immunity only to the extent that the official at whose direction he performs those duties would have such immunity had he performed the

duties himself. *Barr* and *McMillan* together thus establish that federal government officials have absolute immunity for acts done in the performance of their official duties in two situations: first, if the duties involve a significant element of discretion, and second, even if the duties are primarily non-discretionary, if the official at whose behest they are performed would have absolute immunity.

The rationale for absolute immunity found persuasive in *Barr* continues to be persuasive today, and the principle of absolute immunity should be continued. Under the absolute immunity doctrine the principal factual inquiry is whether the official was acting within his line of duty—a relatively straightforward and easy determination that allows a termination of the litigation "at the outset" (*Imbler* v. *Pachtman,* 424 U.S. 409, 419 n. 13). Under qualified immunity, however, there is likely to be a wide range of questions concerning the official's motives and intentions, and the reasonableness of his action. Contrary to the court of appeals' view, such questions are not easily resolved on affidavits or on a motion for summary judgment.

As a practical matter, under qualified immunity "[t]he fate of an official * * * depends upon the circumstances and motivations of his actions, as established by the evidence at trial" (*ibid.*). Moreover, it is impossible to be sure how a jury would react to such evidence. An official "may * * * find himself hard put to it to satisfy a jury of his good faith," and thus even the blameless official who is sued would often

be subjected "to the burden of a trial and to the inevitable danger of its outcome" (*Gregoire* v. *Biddle,* 177 F. 2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949).

It is easy for persons who believe they have been unfairly treated by government officials to charge that those officials acted "maliciously" in performing their duties. It is the threat of such claims that is likely "appreciably [to] inhibit the fearless, vigorous, and effective administration of policies of government" (*Barr* v. *Matteo, supra,* 360 U.S. at 571). For these reasons, it is "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation" (*Gregoire* v. *Biddle, supra,* 177 F. 2d at 581).

Contrary to the view of the court of appeals, this Court's recent decisions in *Scheuer* v. *Rhodes,* 416 U.S. 232, and *Wood* v. *Strickland,* 420 U.S. 308, holding that certain state officials sued for damages under 42 U.S.C. 1983 have only qualified immunity, do not undermine the reasoning of *Barr* v. *Matteo* and do not warrant curtailment of the absolute immunity of federal officials. *Scheuer* and *Wood* rest in large part upon the Court's conclusion that a general grant of absolute immunity to state officials sued under 42 U.S.C. 1983 would be inconsistent with Congress' intention to subject such officials to damage suits under this statute. Moreover, in providing only qualified immunity for state officials, the Court has given weight to the fact that at state common law those officials have a qualified rather than an absolute immunity.

That reasoning is inapplicable to the present case, which deals with the long-standing rule of immunity for federal officials under federal law (*Howard* v. *Lyons,* 360 U.S. 593), and in which the continuation of absolute immunity would not be inconsistent with any federal statute. *Scheuer* and *Wood* do not invalidate the conclusion in *Barr* v. *Matteo* that absolute immunity is necessary "to aid in the effective functioning of government" (360 U.S. at 573). In *Imbler* v. *Pachtman, supra,* where the Court held that a state prosecutor sued for damages under 42 U.S.C. 1983 has absolute immunity, the Court again recognized the important role that that principle plays in the effective conduct of governmental business.

II. Federal officials engaged in enforcing regulatory legislation by initiating, conducting or deciding administrative proceedings necessarily have substantial discretion, the exercise of which would be influenced detrimentally by the threat of personal liability and litigation. Such proceedings frequently involve complex as well as important and hotly contested issues, and damage suits in retaliation against the officials responsible for bringing and deciding them "could be expected with some frequency * * *" (*Imbler* v. *Pachtman, supra,* 424 U.S. at 425).

This case is based upon the initiation, prosecution, and adjudication of an administrative enforcement proceeding under the Commodity Exchange Act, a statute providing a comprehensive regulatory scheme for trading in "futures" of specified commodities.

The Act gives the Secretary of Agriculture broad investigative and enforcement authority, which he in turn has delegated to other officials in the Department. All of the petitioners' actions upon which respondent's complaint is based were taken under this regulatory scheme in the performance of their official duties. Moreover, the actions either involved the exercise of substantial discretion or were done at the behest of superior officers who themselves would have had absolute immunity had they taken the actions themselves.

The fact that the court of appeals ultimately overturned the administrative order does not indicate that petitioners were acting outside the scope of their authority in this case. The applicable statutes and regulations authorize the actions taken by petitioners in the circumstances found by them to have existed in respondent's case. It was therefore within the scope of petitioners' discretionary authority to initiate, conduct, and decide the enforcement action as they did.

The fact that some of the claims in this case allege that petitioners' actions violated respondent's constitutional rights does not require that petitioners' immunity be only a qualified one. The conflicting public and private interests that the Court weighed in *Barr* v. *Matteo* should not be differently evaluated because the complaint is framed in constitutional rather than common law terms. Here, respondent's suit is essentially for "defamation and kindred torts" (*i.e.*, malicious prosecution), for which *Barr* held that federal

officials have absolute immunity (360 U.S. at 569), and the basic character of the claim cannot be changed by the form in which the pleading is drafted.

ARGUMENT

Almost 20 years ago in *Barr* v. *Matteo,* 360 U.S. 564, this Court held that a federal government official had an absolute rather than a qualified immunity from a suit for damages challenging an action taken by him in the performance of his official duties. Although there was no opinion of the Court, Mr. Justice Stewart in dissent described Mr. Justice Harlan's plurality opinion (for 4 members of the Court) as containing "a lucid and persuasive analysis of the principles that should guide decision in this troublesome area of law" (360 U.S. at 592). Mr. Justice Stewart's disagreement with the plurality opinion was only "in the application of these principles to the facts of the present case" (*ibid.*). In the companion case of *Howard* v. *Lyons,* 360 U.S. 593, Mr. Justice Stewart concurred in the opinion of the Court, which on the authority of *Barr* recognized absolute immunity for a government official's action taken "in the discharge of [his] * * * official duties * * *" (360 U.S. at 598). A majority of the Court in *Barr* and *Howard* thus recognized the absolute immunity doctrine for federal officials.

In two subsequent decisions this Court has held that state officials sued for damages under the Civil Rights Act of 1871, 17 Stat. 13 (42 U.S.C. 1983), for actions taken as part of their official duties had only a quali-

fied and not an absolute immunity, *i.e.*, that they have immunity only if their official actions were taken in good faith and with a reasonable basis. *Scheuer* v. *Rhodes,* 416 U.S. 232; *Wood* v. *Strickland,* 420 U.S. 308.

On the authority of *Barr* v. *Matteo,* the district court in this case dismissed a damage suit against petitioners—all federal officials—based upon their actions in initiating, conducting, and deciding an administrative enforcement proceeding under the Commodity Exchange Act. The court of appeals, although apparently recognizing that under *Barr* dismissal of the suit was required (Pet. App. A, p. 8a), concluded that the Court's subsequent decisions had so undermined *Barr* that petitioners have only a qualified and not an absolute immunity (Pet. App. A, pp. 8a–16, 20a).

The issue before the Court, therefore, is whether the doctrine of absolute immunity set forth in *Barr* is to be continued, or whether a qualified immunity is adequate to protect federal officials in the performance of their duties. In Point I of this brief, we shall show that the reasons that led the Court in *Barr* to conclude that absolute immunity was necessary for the proper functioning of the federal government are just as compelling today as when *Barr* was decided, and that the Court's subsequent decisions providing only a qualified immunity for state officials sued under 42 U.S.C. 1983 do not undermine the holding or reasoning of *Barr*. In Point II we shall show that under the principle of absolute immunity, none of the petitioners is subject to suit for his action in instituting, conducting, or deciding the administrative enforcement proceeding.

I

THE RULE THAT FEDERAL GOVERNMENT OFFICIALS HAVE ABSOLUTE IMMUNITY FROM DAMAGE SUITS BASED UPON THE PERFORMANCE OF THEIR OFFICIAL DUTIES RESTS UPON SOUND PUBLIC POLICY CONSIDERATIONS AND SHOULD BE REAFFIRMED

A. THE ABSOLUTE IMMUNITY OF FEDERAL OFFICIALS RECOGNIZED IN *BARR* V. *MATTEO* RESTS UPON SOUND PUBLIC POLICY CONSIDERATIONS

The absolute immunity of federal officials "is not a badge or emolument of exalted office, but is an expression of a policy designed to aid in the effective functioning of government" (*Barr* v. *Matteo, supra,* 360 U.S. at 572–573). The rationale of the immunity is that it is "important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government" (360 U.S. at 571). As Judge Learned Hand explained, in a famous passage quoted with approval in *Barr* (360 U.S. at 571):

> It does indeed go without saying that an official, who is in fact guilty of using his powers

to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. * * *

The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official

> powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him * * *. [*Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949.]

Barr plowed no new ground.[11] The Court there relied upon its earlier decision in *Spalding* v. *Vilas*, 161 U.S. 483, in which in 1895 it held that the Postmaster General was absolutely immune from suit for damages for allegedly malicious defamation and interfer-

[11] Indeed, "the law before the Barr decision was overwhelmingly what the majority held it to be in the Barr case * * *." Davis, *Administrative Law Treatise* § 26.04, pp. 876–877 (1970 Supp.). In addition to the cases discussed in the text, see, *e.g.*, *Adair* v. *Bank of America National Trust and Savings Assn.*, 303 U.S. 350; *Taylor* v. *Glotfelty*, 201 F. 2d 51 (C.A. 6); *Papagianakis* v. *The Samos*, 186 F. 2d 257 (C.A. 4), certiorari denied, 341 U.S. 921; *Gibson* v. *Reynolds*, 172 F. 2d 95 (C.A. 8), certiorari denied, 337 U.S. 925; *Laughlen* v. *Rosenman*, 163 F. 2d 838 (C.A.D.C.); *Jones* v. *Kennedy*, 121 F. 2d 40 (C.A.D.C.), certiorari denied, 314 U.S. 665; *Glass* v. *Ickes*, 117 F. 2d 273 (C.A.D.C.), certiorari denied, 311 U.S. 718; *Cooper* v. *O'Connor*, 99 F. 2d 135 (C.A.D.C.); *Lang* v. *Wood*, 92 F. 2d 211 (C.A.D.C.), certiorari denied, 302 U.S. 686; *Standard Nut Margarine* v. *Mellon*, 72 F. 2d 557 (C.A.D.C.), certiorari denied, 293 U.S. 605.

ence with contractual relationships. "In exercising the functions of his office," the Court said, "the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs * * *" (161 U.S. at 498).

Spalding, in turn, relied upon *Bradley* v. *Fisher,* 13 Wall. 335, where "[t]his Court early held that judges of courts of superior or general authority are absolutely privileged as respects civil suits to recover for actions taken by them in the exercise of their judicial functions, irrespective of the motives with which those acts are alleged to have been performed" (*Barr* v. *Matteo, supra,* 360 U.S. at 569). In *Bradley,* the Court had explained that "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself" (13 Wall. at 347). The Court in Spalding determined that "the same general considerations of public policy" that underlie the doctrine of judicial immunity also require absolute immunity for executive officials "engaged in the discharge of duties imposed upon them by law" (161 U.S. at 498). See also *Yaselli* v. *Goff,* 275 U.S. 503, affirming *per curiam,* 12 F. 2d 396 (C.A. 2.).

Barr made clear that the existence of absolute immunity depends not upon the rank of the official but upon the nature of the duties performed. "It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' *Spalding* v. *Vilas, supra,* at 498—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits" (360 U.S. at 573–574). "The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy" (360 U.S. at 573; footnote omitted). "[T]o hold that only the heads of departments should be immune * * * under the rule would defeat its purpose. * * * When the act done occurs in the course of [a subordinate] official['s] duty, * * * it is the official action of the department; and the same reason for immunity applies as if it had been performed by the superior officer himself." *Cooper* v. *O'Connor,* 99 F. 2d 135, 142 (C.A.D.C.).

Barr and its companion *Howard* thus recognized the principle that government officials have an abso-

lute immunity from suit for damages based upon actions taken in the performance of their official duties. Although *Barr* was a libel suit,[12] the rationale upon which it established absolute immunity is not limited to that type of action but is equally applicable to all actions for damages based upon federal officials' performance of their duties. This Court has not treated *Barr* as covering only libel actions, but has viewed it more broadly as establishing absolute immunity for federal officials from whom damages are sought as a result of their official actions. See *Doe* v. *McMillan,* 412 U.S. 306, 318–320, 322–323; *Scheuer* v. *Rhodes,* 416 U.S. 232, 247.

Similarly, the lower federal courts have not restricted the absolute immunity announced in *Barr* to defamation suits. Following *Barr,* the courts of appeals have applied the doctrine of absolute immunity to a wide variety of actions taken by federal officials as part of their official duties.[13]

[12] *Barr* applied the absolute immunity principle to a suit based upon the issuance of a libelous press release by the Acting Director of the Office of Rent Stabilization. The court ruled that it was "[a]n appropriate exercise of the discretion with which an executive officer of petitioner's rank is necessarily clothed to publish the press release here at issue in the circumstances disclosed by this record" (360 U.S. at 574; see also *id.* at 575).

[13] As the court of appeals said in *Norton* v. *McShane,* 332 F. 2d 855, 858 n. 3 (C.A. 5), certiorari denied, 380 U.S. 981: "Although *Barr* v. *Matteo* involved a suit based on defamation, the majority opinion clearly implies that the rules of law expressed therein apply to civil tort suits generally; and the opinion has been so construed in subsequent cases." See, *e.g., Berberian* v. *Gibney,* 514 F. 2d 790 (C.A. 1); *Mandel* v. *Nouse,* 509 F. 2d 1031 (C.A. 6),

In *Doe* v. *McMillan, supra,* however, the Court placed a gloss upon the *Barr* principle by ruling that where the government official does not exercise any significant discretion in performing his official duties, he has absolute immunity only to the extent that the official at whose direction he performs those duties would have such immunity had he performed the duties himself. The Court in *McMillan* held that on the record before it official immunity did not bar a suit for damages against the Public Printer and the Superintendent of Documents based upon their printing and distribution of a Report of a Committee of the House of Representatives.[14] Although recognizing that the printing and distribution of the Report "would be 'within the outer perimeter' of the statutory duties of the Public Printer and the Superintendent of Documents," the Court held that absolute immunity does not "automatically attach to any conduct expressly or impliedly authorized by law" (412 U.S. at 322).

certiorari denied, 422 U.S. 1008; *Peterson* v. *Weinberger,* 508 F. 2d 45 (C.A. 5), certiorari denied, 423 U.S. 830; *Ruderer* v. *Meyer,* 413 F. 2d 175 (C.A. 8), certiorari denied, 396 U.S. 936; *David* v. *Cohen,* 407 F. 2d 1268 (C.A.D.C.); *Heine* v. *Raus,* 399 F. 2d 785 (C.A. 4); *Wozencraft* v. *Captiva,* 314 F. 2d 288 (C.A. 5); *Ove Gustavsson Contracting Co.* v. *Floete,* 299 F. 2d 655 (C.A. 2), certiorari denied, 374 U.S. 827; *Poss* v. *Lieberman,* 299 F. 2d 358 (C.A. 2), certiorari denied, 370 U.S. 944; *Sauber* v. *Gliedman,* 283 F. 2d 941 (C.A. 7), certiorari denied, 366 U.S. 906.

[14] The court of appeals had held that the suit was barred by "the official immunity doctrine recognized in *Barr* v. *Matteo*" (412 U.S. at 310).

The Court noted that the "Government Printing Office acts as a service organization for the branches of the Government," and that the Public Printer and Superintendent of Documents "exercise discretion only with respect to estimating the demand for particular documents and adjusting the supply accordingly" (412 U.S. at 322–323). It held that although the Government Printing Office "is independently created and manned and invested with its own statutory duties," it had no "independent immunity" but was immune only "to the extent that the department head himself would be immune if he ran his own printing press and distributed his own documents" (412 U.S. at 323; see also *id.* at 342 (dissenting opinion of Mr. Justice Rehnquist)).

The Court concluded that although the members of Congress were immune under the Speech or Debate Clause "for ordering or voting for a publication going beyond the reasonable requirements of the legislative function," legislative aides did not have a similar immunity for "carrying out such nonlegislative directions" (412 U.S. at 315), and that "the Public Printer and the Superintendent of Documents are no more free from suit in the case before us than would be a legislative aide who made copies of the materials at issue and distributed them to the public at the direction of his superiors" (412 U.S. at 324).

Barr and *McMillan* together thus establish that federal government officials have absolute immunity for acts done in the performance of their official duties

in two situations. First, the official is immune if the duties involved a significant element of discretion, *i.e.*, if "the function itself was of such a discretionary nature that the threat of litigation would impede the official to whom it was assigned" (*David* v. *Cohen*, 407 F. 2d 1268, 1272 (C.A.D.C.)). This is a standard that "reflects the purpose for which immunity is granted * * * to ensure that important decisions are made free from the fear of personal liability or harassing suits" *Johnson* v. *Alldredge,* 488 F. 2d 820, 824 (C.A. 3), certiorari denied *sub nom. Cronrath* v. *Johnson,* 419 U.S. 882)."[15]

Second, the official is immune even if the duties are primarily ministerial and non-discretionary, if the official at whose behest they are performed would have absolute immunity had he performed them himself. This standard gives proper recognition to the fact that governmental functions do not become "less important simply because they are exercised by officers of lower rank in the executive hierarchy" (*Barr* v. *Matteo, supra,* 360 U.S. at 573). "If * * * recognition of an absolute privilege for judges, legislators and highly placed executive officers of the government, when acting in line of duty, is to serve its intended purpose, it must extend to subordinate officials * * * who exe-

[15] The Second Circuit stated the test as follows: "[I]s the act complained of the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability?" (*Ove Gustavsson Contracting Co.* v. *Floete*, 299 F. 2d 655, 659 (C.A. 2), certiorari denied, 374 U.S. 827).

cute the official's orders" (*Heine* v. *Raus,* 399 F. 2d 785, 790 (C.A. 4); see *Berndtson* v. *Lewis,* 465 F. 2d 706 (C.A. 4); *Cooper* v. *O'Connor, supra,* 99 F. 2d at 142; *Grossman* v. *McKay,* 384 F. Supp. 99 (D. Md.)). But see *Johnson* v. *Alldredge, supra.*

B. THE RATIONALE UPON WHICH THE COURT IN *BARR* CONCLUDED THAT ABSOLUTE IMMUNITY IS NECESSARY IS AS COMPELLING TODAY AS WHEN THE CASE WAS DECIDED, AND THE PRINCIPLE OF ABSOLUTE IMMUNITY SHOULD BE CONTINUED

1. The principal inquiry in determining whether a federal official is entitled to absolute immunity is whether the actions upon which the suit is based were done as a part of his official duties.[16] In *Bradley* v. *Fisher, supra,* 13 Wall. 351–352, the Court said in the case of judicial immunity that "[w]here there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible." "As in the case of a judicial officer," the Court in *Spalding* v. *Vilas, supra,* 161 U.S. at 498, recognized a distinction, for the purposes of immunity for executive officials, between "action taken * * * in reference to matters which are manifestly or palpably beyond [the official's] authority, and action having more or less connection with the general matters committed by

[16] The courts "have * * * always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers * * *." *Gregoire* v. *Biddle, supra,* 177 F. 2d at 581.

law to his control or supervision."[17] In *Barr* v. *Matteo, supra,* 360 U.S. at 575, the Court rested its granting of absolute immunity on "[t]he fact that the action here taken was within the outer perimeter of petitioner's line of duty * * *."

An official otherwise entitled to absolute immunity does not lose it because of allegations that he acted maliciously or unreasonably. *Gregoire* v. *Biddle, supra,* 177 F. 2d at 581. Absolute immunity prevents having liability turn upon "any consideration of the motives with which the acts are done." *Bradley* v. *Fisher, supra,* 13 Wall. at 354. Nor is the immunity destroyed by a claim that the official acted erroneously in a particular case, as long as the official was acting pursuant to his duties as a government officer.

Since the determination whether the official's actions were part of his duties turns upon objective criteria that do not involve motive or intent, the existence of absolute immunity ordinarily can be easily shown. Usually a court can make such a determination on the basis of affidavits describing the authority of the official and the precise actions taken in exercising that authority. That was the procedure followed in this case, where the government filed affidavits (A. 141–149) describing the functions of each of the defendants and showing why their actions were part of their official duties. See Point II, *infra.*

[17] The Court found that the action of the Postmaster General giving rise to the suit in *Spalding* "was not unauthorized by law, nor beyond the scope of his official duty" (161 U.S. at 493).

The principle of absolute immunity thus permits the courts to dispose of these cases expeditiously—ordinarily on the basis of a motion to dismiss or for summary judgment—and to avoid the protracted litigation "which would consume time and energies which would otherwise be devoted to governmental service" (*Barr* v. *Matteo, supra,* 360 U.S. at 571). See *Imbler* v. *Pachtman,* 424 U.S. 409, 419 n. 13.

In contrast, the defense of qualified immunity is likely to open up a wide range of questions concerning the official's motives and intent in performing his duties.[18] Did he really have a good faith belief that he was justified in taking action, or was the official action taken in bad faith, merely as a pretext for retaliating against the plaintiff? What were his reasons for deciding to act as he did? Did he take similar actions against others similarly situated? What did he hope to accomplish by his actions? These and similar questions frequently would result in a sweeping probe of the official's mental processes and intentions.

Such an inquiry undoubtedly would entail broad discovery that could consume substantial time of fed-

[18] The Court explained the scope of the qualified immunity in *Scheuer* v. *Rhodes* as follows (416 U.S. at 247–248):

> * * * in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action in which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

eral officials—both the defendants and their colleagues who might be able to shed light upon their actions. Unlike the narrow inquiry under the absolute immunity doctrine whether the government official's actions were part of his official duties, the broad-ranging issues under a qualified immunity standard normally are not susceptible of determination on the basis of affidavits, but would require testimony and cross-examination. As this Court explained recently, in holding that prosecutors have absolute immunity for actions done as part of their official duties, under qualified immunity "[t]he fate of an official * * * depends upon the circumstances and motivations of his actions, as established by the evidence at trial" (*Imbler* v. *Pachtman, supra,* 424 U.S. at 419 n. 13).

Moreover, it is impossible to predict with any certainty how a jury would react to such evidence. Mistakes in judgment or legal errors may, because of the surrounding circumstances, appear to involve an unjustified persecution of or campaign against the plaintiff, and lead the jury to render a substantial personal judgment against government officials who were only attempting to do their duty as they saw it. An official "may * * * find himself hard put to it to satisfy a jury of his good faith," and thus even the blameless official who is sued would often be subjected "to the burden of a trial and to the inevitable danger of its outcome" (*Gregoire* v. *Biddle, supra,* 177 F. 2d at 581).

Because of the doubts and uncertainties about the consequences under qualified immunity of acting in a

close or sensitive matter, government officials are likely to allow the possibility of substantial personal liability or, at least, significant burdens in defending a law suit, to influence their judgment in performing their duties. A government official who realizes that his decision to act against a particular individual may subject him to suit and substantial personal liability, is likely to let that consideration color his judgment. An official inevitably would "find it difficult honestly and independently" to do his work "if he knew that * * * unfavorable [action], coupled with an allegation of * * * malice, could subject him * * * to possible personal liability, as a result of which he might lose his home, his automobile, his savings and whatever other property, real or personal, he might possess." *Ove Gustavsson Contracting Co.* v. *Floete, supra,* 299 F. 2d at 658.

The situation is exacerbated because people who believe that the government is persecuting them will not hesitate to make serious charges against the officials they consider responsible for their predicament. It is easy for persons who think that government officials have treated them unfairly to charge that those officials acted "maliciously" in performing their duties. "Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate" (*Imbler* v. *Pachtman, supra,* 424 U.S. at 425).

In sum, a qualified immunity would be inadequate to accomplish the basic purpose of the official immu-

nity doctrine itself to insure that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government" (*Barr* v. *Matteo, supra,* 360 U.S. at 571).

2. The court of appeals suggested (Pet. App. A, pp. 21a–22a) that under the qualified immunity doctrine cases that have no merit could be expeditiously disposed of on summary judgment. But even summary judgment might entail extensive and time consuming discovery. Moreover, as we have shown (*supra,* pp. 28–29), many and perhaps most of the cases would require a more searching analysis of the defendant's motives and intent than can effectively be made under the summary judgment procedure. In considering a motion for summary judgment, the court must resolve all ambiguities and draw all favorable inferences in favor of the party against whom summary judgment is sought (*United States* v. *Diebold, Inc.,* 369 U.S. 654, 655), and the burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute (*Adickes* v. *Kress & Co.,* 398 U.S. 144, 157). See Rule 56(c), Fed. R. Civ. P. Since under the qualified immunity standard the motives and intent of the official are

key elements of his ultimate liability,[19] courts would be reluctant to decide them against the plaintiff prior to trial, thereby foreclosing the plaintiff's right to prove his case.

The court of appeals' reasoning rejects the fundamental philosophy upon which the absolute immunity doctrine rests. The court stated (Pet. App. A, pp. 20a–21a; footnote omitted):

> If, indeed, the plaintiff has evidence to the effect that the proceedings against him were instituted and prosecuted maliciously and without reasonable grounds, or that the defendants knowingly caused the defamatory press releases to be issued regarding him or his company, the policy against abuse of official power requires that he be given an opportunity to prove his claim. If, on the other hand, the plaintiff's claims are baseless, as defendants maintain, our holding does not necessarily require them to face an expensive, protracted or wasteful trial.

But the rationale of the official immunity doctrine is that it is "better to leave unredressed the wrongs

[19] In *Pierson* v. *Ray*, 386 U.S. 547, 555–557, the Court treated the determinations of "good faith and probable cause" not as elements of an immunity, but as an affirmative defense to liability. See also *Bivens* v. *Six Unknown Named Agents*, 453 F. 2d 1339, 1341, 1347–1348 (C.A. 2). Although the Court in *Scheuer* v. *Rhodes*, *supra*, expanded upon the standard set forth in *Pierson* and described it as a "qualified immunity" (see note 18, *supra*), the Court nevertheless has recognized that the standard is not an immunity from trial but a defense to liability. See *Scheuer* v. *Rhodes*, *supra*, 416 U.S. at 243; *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 419 n. 13.

done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation * * *" (*Gregoire* v. *Biddle*, *supra*, 177 F. 2d 581). The doctrine recognizes that there may be instances in which the existence of the immunity precludes recovery on meritorious claims—such as where the proceedings "were instituted and prosecuted maliciously and without reasonable cause" or where "defamatory press releases" were issued (as in *Barr*). It reflects the judgment that on balance the public interest is best served by denying recovery in such cases in order "to aid in the effective functioning of government" (*Barr* v. *Matteo*, *supra*, 360 U.S. at 573). "To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good" (360 U.S. at 576).

3. The court of appeals also stated (Pet. App. A, p. 16a) that damage suits "frequently serve the public interest by deterring official misconduct * * *." But "other sanctions than civil tort suits [are] available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner" (*Barr* v. *Matteo*, *supra*, 360 U.S. at 576).

Federal officials know that they are subject to censure or to discharge from their jobs if they act unreasonably or improperly. Because the conduct of

members of the executive branch of the government is scrutinized not only by supervisors and superiors but also by Congress, the press and the public, misconduct by government employees is unlikely to go undetected or unpunished. Moreover, many actions by federal officials, like the action that gave rise to this lawsuit, are subject to review and correction by courts in suits under the Administrative Procedure Act and other statutory review provisions.

Finally, the immunity does not bar criminal prosecution of government officials who violate the law. "This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law" (*Imbler* v. *Pachtman, supra,* 424 U.S. at 429).

In determining the immunity of federal officials, recent instances of serious abuse of their authority by some of those officials cannot be ignored. Indeed, at first blush, it might seem contrary to the public interest to deny recovery to the victims of those misdeeds by giving those officials absolute immunity. Of course, some of the misdeeds may have been so excessive or gross that they cannot be deemed to have been done "within the scope of [the official's] powers" (*Gregoire* v. *Biddle, supra,* 177 F. 2d at 581). In any event, the doctrine has always recognized that its application may result in denial of recovery in

some cases where citizens have been injured as a result of official's improper conduct.

Immunity is given because, on balance, "the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities" is deemed to outweigh "the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government" (*Barr* v. *Matteo, supra,* 360 U.S. at 565). The fact that there may have been some particularly egregious misuse of government authority in recent years does not justify jettisoning the salutary principle of official immunity, which has been adopted in the public interest to further the efficient functioning of the entire federal government.

C. THIS COURT'S RECENT DECISIONS HOLDING THAT STATE OFFICIALS SUED FOR DAMAGES UNDER 42 U.S.C. 1983 HAVE ONLY QUALIFIED IMMUNITY DO NOT REQUIRE OR WARRANT A SIMILARLY LIMITED IMMUNITY FOR FEDERAL OFFICIALS

Two recent decisions of this Court held that certain state officials sued under 42 U.S.C. 1983 for damages based upon the performance of their official duties have only a qualified rather than an absolute immunity. *Scheuer* v. *Rhodes, supra* (governor and other state officials); *Wood* v. *Strickland, supra*

(school administrators and school board members); cf. *Imbler* v. *Pachtman, supra,* 424 U.S. at 419; *Pierson* v. *Ray, supra.*[20] As noted, the court of appeals here stated that "[h]ad *Barr* represented the last word in this evolving area, we might be inclined, as was the district court, to follow it in this case * * *" (Pet. App. A, p. 8a). It concluded, however, on the basis of the "principles" it believed this Court had developed in *Pierson, Scheuer, Wood* and *Imbler* (Pet. App. A, pp. 8a–20a), that petitioners "and the performance of their executive duties are adequately protected by permitting them to avail themselves of the defense of qualified 'good faith, reasonable grounds' immunity of the type approved by the Supreme Court in *Scheuer* and *Wood*" (Pet. App. A. p. 20a; footnote omitted).

Contrary to the view of the court of appeals, this Court's recent decisions under 42 U.S.C. 1983 do not undermine the reasoning of *Barr* v. *Matteo* and do not warrant curtailment of the absolute immunity of federal officials. Those decisions do not invalidate the conclusion in *Barr* v. *Matteo* that absolute immunity for federal officials is necessary "to aid in the effective

[20] *Pierson* held that in a suit for damages under 42 U.S.C. 1983 against a judge and police officers, the former had absolute immunity but the police officers had only an affirmative defense of "good faith and probable cause" (386 U.S. at 555–557; see note 19, *supra*). The rationale of the latter ruling, however, was not that such a defense adequately protected the police officers, but that "the common law has never granted police officers an absolute and unqualified immunity, and the officers in this case do not claim that they are entitled to one" (386 U.S. at 555). See also *Bivens* v. *Six Unknown Named Agents*, 456 F. 2d 1339 (C.A. 2).

functioning of government," in order that "the public service [may] function effectively" (360 U.S. at 573, 575). *Scheuer* and *Wood* are not based upon the view that only the more limited immunity is necessary to enable government officials to function effectively. Instead, they rest in large part upon the Court's conclusion that a general grant of absolute immunity to state officials sued under 42 U.S.C. 1983 would be inconsistent with Congress' intention in enacting that provision to subject such officials to damage suits.

Section 1983 makes liable in an action for damages "[e]very person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State," deprives any person of "any rights, privileges, or immunities secured by the Constitution and laws." Noting that in *Monroe* v. *Pape,* 365 U.S. 167, 172, the Court had said that that section was intended " 'to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position' " (416 U.S. at 243),[21] the Court in

[21] See, also, *District of Columbia* v. *Carter*, 409 U.S. 418, where the Court explained that Section 1983 had been "designed primarily in response to the unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others" (409 U.S. at 426). "To the Reconstruction Congress, the need for some form of federal intervention was clear," but "[i]t was equally clear" that Congress could not itself "exert any direct control, on a day-to-day basis, over the actions of state officials" (409 U.S. at 427). Congress therefore chose "to involve the federal judiciary" (*ibid.*), as a means of providing "at least indirect federal control over the unconstitutional actions of state officials" (409 U.S. at 428).

Scheuer reasoned that "government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under [the] terms" of 42 U.S.C. 1983, because "[u]nder the criteria developed by precedents of this Court, § 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer have [absolute immunity]" (416 U.S. at 243, 248).

As Mr. Justice White pointed out in his concurring opinion in *Imbler* v. *Pachtman, supra,* 424 U.S. at 433–434: "It is manifest * * * that all state officials as a class cannot be immune absolutely from damage suits under 42 U.S.C. § 1983 and that to extend absolute immunity to any group of state officials is to negate *pro tanto* the very remedy which it appears Congress sought to create. * * * Thus, * * * the Court has not extended *absolute* immunity to such officials in the absence of the most convincing showing that the immunity is necessary" (emphasis in original). Similarly, in *Wood* v. *Strickland, supra,* 420 U.S. at 322, the Court recognized that the extension of absolute immunity to the state officials in that case would "deny much of the promise of § 1983."

To give state officials generally absolute immunity from suits under 42 U.S.C. 1983 would be to deny to the victims of their misconduct the very right of recovery that Congress intended to provide. The Court therefore has recognized absolute immunity under that statute only in limited circumstances, *e.g.*, in the

case of judges (*Pierson* v. *Ray, supra*) and prosecutors (*Imbler* v. *Pachtman, supra*), where the Court has "concluded that immunities 'well grounded in history and reason' had not been abrogated 'by covert inclusion in the general language' of § 1983" (*Imbler* v. *Pachtman, supra,* 424 U.S. at 418, quoting from *Tenney* v. *Brandhove,* 341 U.S. 367, 376).

In providing only qualified immunity for other state officials, moreover, the Court has given considerable weight to the fact that at state common law those officials have a qualified rather than an absolute immunity. *Pierson* v. *Ray, supra,* 386 U.S. at 555; *Wood* v. *Strickland, supra,* 420 U.S. at 318. In *Imbler* v. *Pachtman, supra,* 424 U.S. 419, the Court pointed out that "[i]n *Scheuer* and in *Wood* * * * the considerations underlying the nature of the immunity of the respective officials in suits at common law led to essentially the same immunity under § 1983."

In contrast, the immunity of federal officials is defined by reference to federal law (*Howard* v. *Lyons, supra,* 360 U.S. at 587), and, as we have shown (*supra,* pp. 17–26), those officials traditionally have been given absolute immunity.

More important, continued recognition of that absolute immunity would not violate or weaken any rights Congress had created to sue federal officials for damages. Congress has not provided a right of action against federal officials comparable to that it

provided against state officials in 42 U.S.C. 1983.[22] Thus, in this case, unlike *Scheuer* and *Wood,* the Court does not have to "take into account" (see 416 U.S. at 243) a legislative enactment that is inconsistent with absolute immunity.

The Court in *Scheuer* recognized that it was dealing only with state officials: it stated that the case in its then posture "present[ed] no occasion for a definitive exploration of the scope of immunity available to *state* executive officials" (416 U.S. at 249; emphasis added). The Court also stated, in quoting with approval from *Barr* v. *Matteo,* that that case arose "[i]n a context other than a § 1983 suit" (416 U.S. at 247).

In sum, this Court's decisions defining the immunity of state officials sued under 42 U.S.C. 1983 do not reject the basic rationale of *Barr* v. *Matteo,* or suggest that it is no longer valid. To the contrary, in holding in *Pierson* and *Imbler* that state judges and prosecutors continue to have absolute immunity in suits under that section, the Court again recognized the important role that absolute immunity plays in

[22] In *District of Columbia* v. *Carter, supra,* 409 U.S. at 429–430, the Court explained that "the rationale underlying Congress' decision not to enact legislation similar to § 1983 with respect to federal officials [was] the assumption that the Federal Government could keep its own officers under control * * *." Although Congress determined that involving federal courts in the trial of damage actions against state officials was a necessary means of obtaining "indirect federal control over unconstitutional actions of state officials" (409 U.S. at 428), Congress' failure to enact similar legislation with respect to federal officials indicates that it was satisfied that such a measure was unnecessary to insure that misconduct by federal officials would be kept in check.

the effective conduct of governmental business. The Court provided only qualified immunity in *Scheuer* and *Wood* because it considered that that would be consistent with state common law and that the broad immunity would be inconsistent with the remedy Congress had created in 42 U.S.C. 1983. That reasoning is inapplicable to the present case, which deals with the immunity of federal officials under federal law (an immunity that "has in large part been of judicial making" (*Barr* v. *Matteo, supra,* 360 U.S. at 569)), and in which the continuation of absolute immunity would not be inconsistent with any federal statute.

Although we believe that government officials generally have absolute immunity for acts done in the performance of their official duties (subject to the conditions discussed above), the Court can reverse the judgment of the court of appeals without precisely defining the contours of the doctrine. For, as we now show, at least with respect to the functions they performed in this case—initiating, conducting and deciding an administrative enforcement proceeding—petitioners have absolute immunity.

II

UNDER THE DOCTRINE OF ABSOLUTE IMMUNITY, THE DISTRICT COURT PROPERLY DISMISSED THIS SUIT AGAINST ALL THE PETITIONERS

If the Court agrees with our submission that the doctrine of absolute immunity for federal govern-

ment officials should be reaffirmed, its normal practice would be to remand this case to the court of appeals to apply that standard to the petitioners. We believe, however, that the record in this case establishes that under the principle of absolute immunity the district court correctly dismissed the suit against all the petitioners. The complaint is based upon petitioners' actions in connection with the initiation, prosecution, and adjudication of an administrative enforcement proceeding under the Commodity Exchange Act. The record shows that all those actions were taken as part of petitioners' official duties, and that they either involved the exercise of significant discretion or were taken at the behest of superior officials who would have been absolutely immune if they personally had taken the actions.

In these circumstances, the Court may deem it appropriate itself to apply the absolute immunity standard to these petitioners and "terminate" "the litigation * * * now" (*O'Leary* v. *Brown-Pacific-Maxon,* 340 U.S. 504–508; *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 621).

1. To put the matter in context, we stress initially the importance of absolute immunity for federal officials engaged in enforcing regulatory legislation. Government officials having such responsibility regularly and frequently are required to decide whether to initiate an investigation, and, if one is undertaken, whether to bring an enforcement proceeding on the basis of the facts developed in that probe. In conducting the investigation, they must determine the scope and methods of the probe and draw inferences from the facts disclosed. If a formal proceeding is brought, the lawyer trying the case must decide what evidence to introduce, what legal theories to urge, and what sanctions to seek. The individual deciding the case—the administrative judge—must evaluate the record before him, apply the law as he understands it, and frame a remedial order.

All of these functions necessarily involve the exercise of substantial discretion, frequently with respect to sensitive and controversial matters. Each "function itself [is] of such discretionary nature that the threat of litigation would impede the official to whom it was assigned" (*David* v. *Cohen, supra,* 407 F. 2d at 1272).[23] As in the case of judges, the need for absolute immunity for administrative law judges stems in large part from the practical consideration that the nature of the adjudicatory function—the resolution of controversies, some of which involve large personal or financial stakes as well as difficult legal and fac-

[23] See *Ove Gustavsson Contracting Co.* v. *Floete, supra,* 299 F. 2d at 659. There the court pointed out, with reference to an official responsible for monitoring the performance of government contracts: "It is much more than a mere possibility that many would be unable freely and honestly to perform their duties if they knew they might be subjected to the risk of trial and personal liability based on an unfavorable report which the ousted contractor might find easy to claim was 'false,' and hence 'malicious.'" See also *Peterson* v. *Weinberger,* 508 F. 2d 45 (C.A. 5); *Jones* v. *Kennedy, supra; White* v. *Joegerman,* 391 F. Supp. 438 (S.D. N.Y.).

tual questions—makes the adjudicator a likely and vulnerable target for attack by individuals who believe he has treated them improperly. See *Bradley* v. *Fisher, supra,* 13 Wall. at 348; *Pierson* v. *Ray, supra,* 356 U.S. at 554. Like a criminal prosecutor, an official responsible for enforcing a regulatory statute "is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them [before the agency]" (*Imbler* v. *Pachtman, supra,* 424 U.S. at 424). Damage suits based upon such actions "could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the [government's] advocate" (424 U.S. at 425).

Absolute immunity for government officials initiating, conducting and deciding administrative enforcement proceedings thus is justified, as it is for judges and prosecutors, by "concern that harassment by unfounded litigation" and the "substantial danger of liability" "would cause a deflection of the [officials'] energies from [their] public duties, and the possibility that [they] would shade [their] decisions instead of exercising the independence of judgment required by [the] public trust" (424 U.S. at 423, 425).

The court of appeals suggested (Pet. App. A, pp. 18a–19a), however, that persons involved in administrative enforcement proceedings generally exercise less discretion than their counterparts in the judicial context, and that the outcome of administrative proceedings has less of an impact upon defendants. But

those proceedings frequently involve complex issues and require the exercise of considerable discretion. See Comment, *Federal Officers—Scope of Immunity from Damage Actions Available to Administrative Agency Officials,* 30 Rutgers L. Rev. 209, 234–237 (1976) (and references there cited).

Such proceedings also often involve important and hotly contested issues. Administrative proceedings brought by the Securities and Exchange Commission against publicly held companies, broker-dealers and accountants for violations of the securities laws, proceedings by the Food and Drug Administration against doctors and drug companies for selling unsafe or ineffective products, and actions by the Federal Trade Commission to remedy antitrust violations or false advertising, are only a few examples of administrative proceedings that are closely analogous, both in their intensely adversarial context and in the effect of the sanctions imposed, to criminal trials. These proceedings often result in far-reaching and precedent-setting decisions in such fields as antitrust, securities regulation, consumer protection and public health, which are of major importance to the regulation of the industries involved.[24]

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[24] The court of appeals also suggested (Pet. App. A, p. 20a, n. 8) that absolute immunity for those performing prosecutorial functions in the administrative context is unnecessary since administrative proceedings "of the type involved in the present case * * * usually turn more on documentary proof than the veracity of witnesses," and involve fewer "constraints of time and * * * information" than a criminal prosecution. The need for absolute immunity to allow administrative prosecutors to act vigorously

2. The Commodity Exchange Act, 42 Stat. 998, as amended, provides a comprehensive regulatory scheme for trading in "futures" of specified commodities on various exchanges. 7 U.S.C. (and Supp. V) 1 *et seq.* The Secretary of Agriculture has broad regulatory

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exists regardless of the type of evidence used or the time constraints involved. But in any event, the court's suggestion rests on dubious factual assumptions.

While the issue in any particular administrative proceeding may involve largely documentary proof, many, if not most, administrative enforcement proceedings involve extensive oral testimony. The administrative action involved in this case is an example. Although much of the case turned upon documentary proof, several key issues required the taking of oral testimony (the transcript of the initial hearing was more than 500 pages, see Decision and Order in CEA Docket No. 167, *supra*, p. 3) and judgments concerning respondent's credibility (see *id.* at 37). Indeed, the administrative decision ultimately was reversed by the court of appeals because it determined that the finding of willfulness—a finding that necessarily was based on inferences derived from oral testimony (see *id.* at 137–149)—was erroneous (see Br. in Opp. 2a–4a). See also *Air East, Inc.* v. *National Transportation Safety Board*, 512 F. 2d 1227 (C.A. 3), certiorari denied, 423 U.S. 863; *George Steinberg & Son, Inc.* v. *Butz*, 491 F. 2d 988 (C.A. 2); *Nadiak* v. *Civil Aeronautics Board*, 305 F. 2d 588 (C.A. 5), certiorari denied, 372 U.S. 913.

Administrative proceedings also often involve constraints of time comparable to those in criminal trials. See, *e.g.*, suspension proceedings under the Federal Insecticide, Fungicide and Rodenticide Act, 86 Stat. 985, 7 U.S.C. (Supp. V) 136d(c)(2), revocation of certification proceedings under the Federal Aviation Act, 72 Stat. 779, as amended, 49 U.S.C. (Supp. V) 1429(a), and proceedings for the issuance of emergency temporary standards under the Occupational Safety and Health Act, 84 Stat. 1596, 29 U.S.C. 655(c).

Moreover, federal criminal trials may at times turn upon documentary proof and involve no more severe time constaints than in certain administrative proceedings, yet these factors have not influenced courts to limit the availability of immunity for judges

authority under the Act.[25] His functions include the registration of "futures commission merchants" and the establishment of various requirements for their business, including the "meet[ing] [of] such minimum financial requirements as the Secretary * * * may by regulation prescribe" (7 U.S.C. 6f(2)). Pursuant to this authority the Secretary promulgated the regulations (17 C.F.R. 1.17 (1970)) prescribing minimum working capital requirements that were involved in the administrative proceedings in this case.

The Secretary is authorized to make "such investigations as he may deem necessary to ascertain the facts regarding the operations of * * * persons subject to any of the provisions of [the Act]" (7 U.S.C. 12; see 7 U.S.C. 15), and to "publish from time to time, in his discretion, the result of such investigation" (7 U.S.C. 12; see 5 U.S.C. 552). Finally, "[i]f the Secretary * * * has reason to believe that any person * * * is violating or has violated any of the provisions of [the Act]," he can file a complaint (7 U.S.C. 9); if the person is registered as a futures commission merchant, the complaint may seek sus-

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and prosecutors in the judicial context. The court of appeals' unsupported generalizations concerning the nature of administrative and judicial proceedings therefore is not an adequate ground for distinguishing the need of prosecutors and judges in the two contexts for immunity.

[25] In 1974 this regulatory authority was transferred to the newly established Commodity Futures Trading Commission. Section 101(a)(3) of the Commodity Futures Trading Commission Act of 1974, Pub. L. 93–463, 88 Stat. 1389, 7 U.S.C. (Supp. V) 4a. See also Sections 104 and 411.

pension or revocation of the registration (*ibid.*). Any person against whom such a complaint is filed is entitled to a hearing before the Secretary "or before a referee designated by the Secretary" (7 U.S.C. 9).[26]

The Secretary delegated most of this regulatory authority to other officials in the Department of Agriculture (see 29 Fed. Reg. 16211, 16214; 36 Fed. Reg. 3210; 37 Fed. Reg. 28463, 28475). The Secretary delegated general responsibility for the execution of policies and the enforcement of the Act to the Administrator of the Commodity Exchange Authority (29 Fed. Reg. 16214; 17 C.F.R. 1.4, 140.1(b) (1970)). The Secretary, however, retained the authority to issue administrative complaints, which under a general delegation order (29 Fed. Reg. 16211) he shared with the Assistant Secretary of Agriculture for Marketing and Consumer Services. The Secretary delegated to the Judicial Officerof the Department of Agriculture his authority to decide enforcement proceedings under the Act. 36 Fed. Reg. 3210; 37 Fed. Reg. 28463, 28475.

3. All of the petitioners' actions upon which the complaint in this case is based were taken under this regulatory scheme in the performance of their official duties. Moreover, the actions either involved the exercise of substantial discretion or were done at the behest of superior officers who themselves would have had absolute immunity.

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[26] Review of the final administrative order is available in the court of appeals, which has "jurisdiction to affirm, to set aside, or modify the order * * *." 7 U.S.C. 9.

a. *Butz.* Petitioner Butz, the former Secretary of Agriculture, had delegated most of his authority under the Act involved in this case to subordinate officials in the Department, and an Assistant Secretary issued the complaint that instituted the administrative proceeding. Petitioner Butz therefore was not "directly involved in any of the actions alleged in the complaint" (A. 145). In any event, as the cabinet officer with overall statutory responsibilities for enforcement of the Act, any actions he might have taken with respect to the initiation or decision of the administrative proceedings would have been discretionary acts within the scope of his authority. See *Spalding* v. *Vilas, supra; Gregoire* v. *Biddle, supra.*

b. *Lyng.* Petitioner Lyng, the Assistant Secretary for Marketing and Consumer Services (A. 145), signed the administrative complaints (A. 145). He took that action pursuant to the authority the Secretary had given him. The issuance of a complaint was done as part of his duties, and the decision to do so involved an exercise of considerable discretion. See *Imbler* v. *Pachtman, supra.*

c. *Caldwell.* Petitioner Caldwell was the Administrator of the Commodity Exchange Authority, to whom the Secretary had delegated general responsibility for administering and enforcing the Act (A. 145–146). In the exercise of that responsibility, Caldwell was responsible for initiating the investigation of respondent's financial condition and for releasing to the press an announcement of the issuance of the administrative complaints (A. 145-146). These were

discretionary functions for which Caldwell has absolute immunity. See *Imbler* v. *Pachtman, supra; Barr* v. *Matteo, supra.*

d. *Kirchhoff & Robinson.* Petitioner Kirchhoff was the Deputy Director of the Commodity Exchange Authority's Registration and Audit Division [27] and petitioner Robinson was the Director of the Authority's Compliance Division [28] (A. 146–147). As senior officials of the Authority, they both participated in the initiation of the administrative proceedings and collaborated in the preparation of the government's case (A. 146–147). Kirchhoff also reviewed the financial statements of respondent and the results of the audits conducted by the regional office (A. 147), and appeared as a witness at the proceedings (A. 147). These activities, which are essential to the effective enforcement of regulatory legislation, involve the exercise of discretion and judgment and were done as a part of Kirchhoff and Robinson's duties (A. 146–147).

e. *McMinn, Gross, Fitzpatrick & Wolkis.* Petitioner McMinn was the Director of the Regional Office of the Commodity Exchange Administration that directed,

[27] The responsibilities of the Registration and Audit Division included developing and administering a ~~problem~~ program for determining whether futures commission merchants met the statutory and regulatory financial requirements, and conducting audits to assure compliance with such requirements. 17 C.F.R. 140.1(c)(1) (1970).

[28] The responsibilities of the Compliance Division included recommending formal proceedings against violators and presenting the results of investigations to, and cooperating with, the General Counsel's Office and the Department of Justice in the preparation of administrative and criminal cases. 17 C.F.R. 140.1(c)(2) (1970).

coordinated and conducted all of the Authority's activities within the area it covered (17 C.F.R. 140.2 (1970); A. 147–148). Petitioners Gross, Fitzpatrick, and Wolkis were auditors of the Authority assigned to that office; Wolkis also performed supervisory functions (A. 148–149). At the direction of the Washington, D.C., office,[29] McMinn directed the other three to audit respondent's books (A. 147–148). All four of these individuals collaborated in preparing and presenting the government's case (A. 147–149). In addition, McMinn, Gross, and Fitzpatrick appeared as witnesses at the administrative proceedings (A. 148).

The conduct of an audit and the preparation of a case for hearing inevitably involve the exercise of considerable discretion. See *Ove Gustavsson Contracting Co.* v. *Floete, supra;* note 23, *supra.* Moreover, all of the actions of these four individuals were taken pursuant to instructions from the Director of the Authority's Registration and Audit Division and at the instigation of the Administrator (A. 144, 145). Because of the discretionary nature of their duties, the latter officials would have had absolute immunity had they performed those functions themselves, and for that reason, McMinn and the three auditors, too, have absolute immunity. See *Doe* v. *McMillan, supra.* Finally, to the extent that respondent's complaint is against McMinn, Gross and Fitzpatrick as witnesses,

[29] The direction came specifically from the Director of the Registration and Audit Division of the Commodity Exchange Authority (A. 144), who was not sued in this case.

they—like petitioner Kirchhoff, who also testified—are absolutely immune under the privilege that witnesses have for testimony given in a judicial or quasi-judicial proceeding. See *ALI, Restatement of Torts,* § 588, pp. 233–234 (1938); cf. *Yaselli* v. *Goff, supra,* 12 F. 2d at 403, 406.

f. *Davis.* Petitioner Davis was a lawyer in the General Counsel's Office of the Department, and presented the government's case at the administrative hearing (A. 147; 1 *Administrative Regulations* ¶210, p. 71 (1963); see 17 C.F.R. 0.11(c) (1970)). These actions were part of his official duties and involved a substantial element of discretion. His functions were similar to those of a prosecutor trying criminal cases. See *Imbler* v. *Pachtman, supra;* note 24, *supra;* cf. *Flood* v. *Harrington,* 532 F. 2d 1248 (C.A. 9).

g. *Bain & Campbell.* Petitioner Bain was the Department's Chief Hearing Examiner;[30] he conducted the hearing in this case and rendered the initial decision sustaining the complaint (A. 147; see 17 C.F.R. 0.2 (m) and (n), 0.7, 0.11 (1970)). Petitioner Campbell was the Judicial Officer of the Department to whom the Secretary had delegated his authority to decide enforcement proceedings under the Act and who rendered the final decision in the case (A. 141).

The only part Bain and Campbell had in the proceedings was to decide the case presented to them on the basis of the record and their interpretation of the law. If either of their decisions was erroneous, it was subject to correction: the Hearing Examiner by

[30] We are informed that petitioner Bain died on March 10, 1976.

the Judicial Officer and the latter by the court of appeals (as happened in this case).

Bain and Campbell are the counterparts in administrative proceedings of the judge in judicial proceedings, and the policy considerations that require absolute immunity for judges (see *Bradley* v. *Fisher, supra; Pierson* v. *Ray, supra*) also warrant like immunity for these quasi-judicial officials. They must evaluate the testimony of the witnesses, draw appropriate inferences from the evidence, and determine and apply the law. Their responsibilities involve a high degree of discretion.[31]

4. Respondent's amended complaint primarily rests its claim that the administrative proceedings were conducted unlawfully and maliciously upon three grounds, none of which rebuts our submission that petitioners have absolute immunity.

a. Respondent first contends that the issuance of the complaint was improper because the administrator had not given him notice of the violations and an opportunity to correct them, as the Administrative

[31] The court of appeals suggested (Pet. App. A, pp. 19a–20a) that the separation-of-powers principle distinguishes judges from administrative law judges and judicial officers. But prosecutors, who are members of the executive branch, have essentially the same immunity as judges when they initiate and conduct criminal proceedings. The scope of immunity is not determined by "judicial fiat that officials in different branches of government are differently amenable to suit" (*Imbler* v. *Pachtman, supra,* 424 U.S. at 421); it is "the duties with which the particular officer[s] * * * [are] entrusted * * * which must provide the guide in delineating the scope of the * * * executive officer['s] * * * immunity from * * * suit[ ]" (*Barr* v. *Matteo, supra,* 360 U.S. at 573–574).

Procedure Act (5 U.S.C. 558(c)) and the regulations under the Commodity Exchange Act (17 C.F.R. 0.3 (c) (1970)) allegedly require (see pars. 5 and 13 of the second amended complaint, A. 157, 159). Both the statutes and the regulations, however, except from the notice and opportunity-to-correct requirements cases involving willfulness. Cf. *George Steinberg and Son, Inc.* v. *Butz,* 491 F. 2d 988 (C.A. 2).

The administrative complaint in this case alleged that respondent's violations of the minimum capital requirements were willful, and the Hearing Examiner and the Judicial Officer so found (see Decision and Order in CEA Docket No. 167, *supra,* pp. 137–149, 193). Accordingly, the initiation, prosecution, and decision of the enforcement action without prior notice were actions within the scope of petitioners' duties.

The fact that the court of appeals set aside the Judicial Officer's order because "the finding of willfulness appears erroneous" (Br. in Opp. 4a) does not mean that the persons responsible for bringing the proceedings acted beyond their authority. A federal official's actions are not outside the scope of his authority simply because it is subsequently determined that he was mistaken. See *Gregoire* v. *Biddle, supra.* "The fact that [an agency] misjudged the exact confines of its jurisdiction * * * and believed that it was proper under the particular circumstances [to proceed] * * * is a long way from acting palpably beyond the duties of an office." *Jones* v. *Kennedy, supra,* 121 F. 2d at 43; see *Bradley* v. *Fisher, supra,* 13 Wall. at 351; *Spalding* v. *Vilas, supra,* 161 U.S.

at 498. Here, the regulations authorize the initiation of enforcement proceedings without prior notice in circumstances found by petitioners to have existed in respondent's case. It was therefore within the scope of petitioners' discretionary authority to proceed with the enforcement action as they did.

b. Respondent next argues that it was improper to conduct proceedings after he had ceased operating as a futures commission merchant and had permitted his registration to expire by not renewing it (see pars. 5, 14, 15, 21 of the complaint, A. 157, 159, 160–161). The administrative complaints, however, sought not only to suspend or revoke respondent's registration, but also to prohibit him from all trading on the commodities markets. The latter remedy could be ordered whether or not respondent was a registered futures commission merchant. See 7 U.S.C. 9. Moreover, the judicial officer could have issued an appropriate remedial order designed to insure that, because of his violations, respondent would not again register as a futures commission merchant. See 7 U.S.C. 12a; Decision and Order in CEA Docket No. 167, *supra,* pp. 194–197 (and cases there cited).

c. Finally, respondent charges that petitioners issued a deceptive press release and made the administrative complaint available to the public without also making public respondent's answer (see pars. 7, 8, 16, 19, 20, 23, 24 of the complaint, A. 158, 159, 160, 161). Petitioners, however, issued no "press release" (App., *infra*). In accordance with the Department of Agriculture's standard practice (App., *infra*; see Decision and Order in CEA Docket No. 167, *supra,* pp.

162–165), copies of the complaint were supplied to reporters in the Department's Press Room. The original complaint had attached a cover sheet summarizing the complaint (A. 150 [32]); it is not known whether a cover sheet also was placed on the amended complaint (App., *infra*).

The release of the complaint to the press was done under statutory and regulatory authority to make available to the public records of the Commodity Exchange Authority. See 5 U.S.C. 552(a); 7 U.S.C. 12; 17 C.F.R. 140.3–140.6 (1970); 7 C.F.R. 1.1–1.4 (1970).[33]

The public disclosure of administrative complaints is a customary practice of federal regulatory agencies. Cf. *Federal Trade Commission* v. *Cinderella Career*

[32] The cover sheet to the original complaint stated that the "complaint charges that * * * respondent * * * failed to meet minimum financial requirements * * *," and that "[t]he issuance of a complaint * * * does not constitute proof of violation * * *" (A. 150).

[33] The Administrator's supervisory responsibilities include the promulgation of rules for the disclosure to the public of information in the possession of the Commodity Exchange Authority. 7 C.F.R. 1.4 (1970). The Secretary has determined generally that the "records of the Department are freely available for public inspection," with "certain exceptions" "limited to those expressly required by law or authorized by the standards and principles contained in [the Freedom of Information Act]." 7 C.F.R. 1.1 (1970). In accordance with this determination, the Administrator promulgated regulations providing broadly for the public disclosure of records of the Commodity Exchange Authority that were not exempt from mandatory disclosure under the FOIA. 17 C.F.R. 140.3–140.6 (1970); see 17 C.F.R. 1.5 (1970). Even records that are exempt from mandatory disclosure may be disclosed under certain circumstances. See 17 C.F.R. 140.6 (1970); 7 C.F.R. 1.4(a)(3) (1970).

& Finishing Schools, Inc., 404 F. 2d 1308, 1312–1314, 1317–1323 (C.A. D.C.); *Bowman* v. *United States Department of Agriculture*, 363 F. 2d 81, 86 (C.A. 5); Decision and Order in CEA Docket No. 167, *supra*, p. 162. In making this material available to the public, petitioners acted within the scope of their authority. See *Barr* v. *Matteo, supra*; *Howard* v. *Lyons, supra*. If respondent wanted the press to be aware of his answer to the complaint, it was his responsibility, not that of petitioners, to make it public.

5. The fact that some of the claims in this case allege that petitioners' actions violated respondent's constitutional rights (pars. 4, 13, 14, 15, 18, 19, 20, A. 157, 159, 160) does not require that petitioners' immunity be only a qualified one.[34] The considerations

[34] Although respondent charges that petitioners denied him due process of law, he does not identify the "property" interest involved. He has not been deprived of any property interest in his registration, since (1) he permitted it to expire and (2) the court of appeals vacated the administrative order suspending it.

To the extent respondent relies upon injury to his business reputation, that in itself is not a "property" interest protected by the Due Process Clause. See *Paul* v. *Davis*, 424 U.S. 693. In *Paul* v. *Davis*, the Court rejected the proposition that "every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' * * * establish[es] a violation of the Fourteenth Amendment" (424 U.S. at 699). The Court also held that, apart from the procedural due process rights that individuals have when the government attempts to alter or extinguish a right or status previously recognized by state law, an individual's "interest in reputation alone" is not a " 'liberty' " or " 'property' " interest guaranteed against state deprivation without due process (424 U.S. at 711–712).

The same analysis would apply here in the context of the Fifth Amendment. Assuming *arguendo* that it provides a basis for dam-

that support absolute immunity for federal officials are equally applicable and compelling whether the claim of improper performance of duties by government officials is framed in constitutional or traditional tort terms.[35]

Moreover, the conflicting considerations the Court weighed in *Barr*—on the one hand "the protection of the individual citizen against pecuniary damage," and on the other "the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits" (360 U.S. at 565)—should not be differently evaluated because the complaint is cast in constitutional terms. In either instance recovery is sought for alleged damages caused by tortious government conduct, and neither the plaintiff's interest in recovery nor the public interest in protecting government officials is altered because the claim is based on the Constitution rather than on the common law.

In the present case, respondent's principal claim is that his business and reputation were damaged by the allegedly unlawful administrative proceedings. Those interests are similar to, and certainly no greater than, the interest involved in *Barr,* where the complaint al-

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age claims against government officials, the Fifth Amendment nevertheless is not "a font of tort law" extending a right to sue "wherever the [government] may be characterized as the tort feasor" (424 U.S. at 701). Moreover, here respondent was afforded all the process to which he was due in connection with the administrative enforcement action.

[35] But see *Apton* v. *Wilson*, 506 F. 2d 83 (C.A.D.C.); *Mark* v. *Groff*, 521 F. 2d 1376 (C.A. 9); *States Marine Lines, Inc.* v. *Shultz*, 498 F. 2d 1146 (C.A. 4); cf. *Bivens* v. *Six Unknown Named Agents*, *supra*.

leged that a defamatory press release had injured the plaintiff's personal reputation. Indeed, part of respondent's claim here rests upon an allegedly defamatory "press release" and, to that extent, it is virtually identical to the claim in *Barr*.

Respondent's suit, in short, is for "defamation and kindred torts," *i.e.,* malicious prosecution, for which the Court in *Barr* held that federal officials have absolute immunity (see 360 U.S. at 569). The fundamental nature of that claim is not altered because respondent has added the allegation that the tortious conduct denied him due process. Such a charge can almost always be made in any tort case against a government official, and the form in which the pleading is drafted cannot obscure the true nature of the claim.

CONCLUSION

The judgment of the court of appeals, insofar as it reversed the dismissal of the complaint against petitioners (see p. 9 *supra*; Pet. App. C, pp. 29a–30a), should be reversed.

Respectfully submitted.

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JUNE 1977.

APPENDIX[1]

United States Department of Agriculture Before the Secretary of Agriculture

(CEA Docket No. 167)

IN RE ARTHUR N. ECONOMOU, AND ARTHUR N. ECONOMOU & CO., INC., RESPONDENTS

Response to Item 13, Judicial Officer's "Questions for the Oral Argument"

1. The Judicial Officer, in his "Questions for Oral Argument," served on the parties by letter dated

[1] The document contained in this appendix is the written response of petitioner Davis to a question that the Judicial Officer (petitioner Campbell) proposed to discuss at oral argument (see Decision and Order in CEA Docket No. 167, *supra*, pp. 6, 162). Respondent has objected to the inclusion of this document in the separate Appendix in this case because it is not part of the record sent to the Court by the court of appeals. We include it in this appendix to petitioners' brief, however, because it properly is a part of the record in this case.

The United States Attorney's records show that this document was handed to the district judge and served on respondent's counsel in open court on April 4, 1975. The document also is contained in the addendum to the petitioners' (defendants-appellees) brief in the court of appeals, at page 9a. (This and other documents were included in the addendum in lieu of an appendix in the court of appeals.) The record does not show that respondent objected to the inclusion of Davis' response in the addendum. The document thus was before the court of appeals when it decided this case.

February 18, 1972, requests in item 13, that copies of any "press releases issued by the complainant as to this proceeding" be forwarded to him and to the respondent.

2. Complainant does not consider that any "press release," as such, has been issued. What has been done is that copies of the complaint and the amended complaint were made available to the reporters using the Department of Agriculture Press Room. This is standard procedure whenever a complaint is issued. (See letter from Assistant Secretary Lyng to respondent filed herein on March 3, 1971 by respondent.) Normally, a cover sheet is attached which summarizes the allegations and explains the meaning and effect of the complaint.

3. Copies of the cover sheet for the original complaint are attached hereto. [See A. 150.] No copy of a cover sheet for the amended complaint is available. It is not now known whether such a cover sheet was attached to the amended complaint when it was placed in the Press Room.

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Commodity Exchange Authority.

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